JUDGMENT

FILED
MAR 13, 2002
Clerk of the District Court
Central District of California
By _____ Deputy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 01-56130
CT/AG#: CV-00-09913-FMC

REGENCY OUTDOOR ADVERTISING, INC., a California corporation; VIRTUAL MEDIA GROUP, INC., a California corporation

Plaintiffs-Appellants

v.

CITY OF LOS ANGELES CALIFORNIA, a municipal corporation

Defendant-Appellee

and

DOES 1 THROUGH 10, Inclusive

Defendant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED

Filed and entered February 14, 2002

A True Copy
Cathy A. Catterson
CLERK OF THE COURT
ATTEST
MAR –8 2002
By: /s/Gail Nelson-Hon
Deputy Clerk

Not For Publication

FILED
FEB 14, 2002
U.S. Court of Appeals
By Cathy A. Catterson, Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56130
D.C. No. CV-00-09913-FMC

REGENCY OUTDOOR ADVERTISING, INC., a California corporation; VIRTUAL MEDIA GROUP, INC., a California corporation,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES CALIFORNIA, a municipal corporation,

Defendant-Appellee,

and

DOES 1 THROUGH 10, Inclusive,

Defendant.

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

MEMORANDUM*

Argued and Submitted January 14, 2002
Pasadena, California

Before: SCHROEDER, Chief Judge, McKEOWN, and CUDAHY,1 Circuit Judges.

Regency Outdoor Advertising, Inc. and Virtual Media Group, Inc. (collectively, "Outdoor") appeal from the district court's order denying preliminary injunctive relief. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and we affirm. Because the parties are familiar with the factual and procedural background, we need not detail it here.

The district court denied Outdoor's motion for a preliminary injunction because it concluded that Outdoor lacked standing. The court reasoned that because none of the compliance orders issued by the City of Los Angeles ("the City") pursuant to its outdoor sign ordinance ("the Sign Ordinance") were for mural violations, Outdoor had suffered no injury. To have standing, Outdoor must satisfy three elements: (1) injury in fact, (2) the injury was reasonably caused by the challenged conduct, and (3) likelihood that the relief requested, if granted, will redress the injury. *See Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996).

Based on the alleged impact of the Sign Ordinance on Outdoor, the citation that recited the mural requirements, the response of Outdoor's lessees, plus other alleged

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

1 The Honorable Richard Cudahy, Senior United States Circuit Judge for the United States Court of Appeals, Seventh Circuit, sitting by designation.

injury, Outdoor has alleged injury that is directly related to the City's enforcement of the Sign Ordinance, thus satisfying the first two prongs of the standing test. Outdoor also meets the third prong. Outdoor asks that the entire Sign Ordinance be struck down as unconstitutional. If such relief were granted, it would redress Outdoor's injury. Accordingly, Outdoor has standing to bring its First Amendment challenge.

Although we disagree with the district court with respect to standing, we affirm on alternative grounds. Outdoor does not meet the merits requirement for preliminary injunctive relief. *See Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (listing criteria for preliminary injunctive relief). At this juncture, Outdoor has failed to produce evidence indicating that the Sign Ordinance's provision for "mural signs" is content-based. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981) (holding that content-based exception to city sign ordinance rendered entire ordinance unconstitutional). And, to the extent that mural signs must be approved by the Cultural Affairs Commission, Outdoor has failed to demonstrate that the Commission enjoys unfettered discretion to accept or reject signs. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755 (1988) ("licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint. . . .").

For the reasons stated above, we conclude that the district court did not abuse its discretion in denying preliminary injunctive relief.

AFFIRMED.

A True Copy
Cathy A. Catterson
CLERK OF THE COURT
ATTEST
MAR –8 2002
By: /s/Gail Nelson-Hon
Deputy Clerk

INTERNAL USE ONLY: Proceedings include all events.
01-56130 Outdoor Advertising, et al. v. Los Angeles, CA, et al.

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APPENDIX C

FILED
MAY 30, 2001
Clerk of the District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

REGENCY OUTDOOR ADVERTISING and VIRTUAL MEDIA GROUP, INC.,

Plaintiffs,

v.

CITY OF LOS ANGELES and DOES,

Defendant.

CV 00-9913 FMC (AIJX)

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; DENYING DEFENDANT'S MOTION TO STAY; AND DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Oral Argument: May 21, 2001

I. Background

Plaintiffs Regency Outdoor Advertising and Virtual Media Group, Inc. ("Plaintiffs") engage in the business of leasing outdoor advertising space to the public. Plaintiffs' signs are located throughout Southern California in both commercial and industrial zones, typically on property leased by Plaintiffs for such purposes. Plaintiffs' signs are classified as "off-premises" signs because they do not advertise goods or services available on the premises where the signs are located.1 Rather, the signs are available for a variety of commercial and non-commercial messages, including political, religious, charitable and public service messages. The content of these signs changes periodically, and the signs are therefore a forum for the expression of ideas.

Defendant City of Los Angeles ("Defendant" or "the City") regulates such signs pursuant to Los Angeles Municipal Code §§ 91.6201 *et seq.* ("the Sign Ordinance"). The City has also adopted a "Sign Manual" pursuant to which it seeks to implement the provisions of the Municipal Code.2

Plaintiffs allege that the Sign Ordinance makes impermissible content-based distinctions between off-premises and on-premises signs. Specifically, the City attempts to keep off-premises signs from being constructed near the freeways, whereas numerous on-site signs are freely allowed within the same geographic area.

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1 This is in contrast to "on-premises" signs, which advertise goods and services available on the premises where such signs are located.

2 The "Sign Ordinance" and the "Sign Manual" will hereinafter collectively be referred to as the "Sign Ordinance."

Plaintiffs also allege that the City makes impermissible distinctions between wall signs and mural signs, frequently allowing mural signs in areas where wall signs are not permitted.3 Mural signs are not subjected to the restrictions placed on wall signs.4 If the sign qualifies as a "mural sign" under the Ordinance, it must receive the additional approval of the City's self-appointed Cultural Affairs Commission ("CAC" or "the Commission"). Plaintiffs claim the Commission is free to approve or disapprove signs without any objective criteria, "exercising complete and unfettered discretion to determine what signs are appropriate and permissible for viewing...."5 (First Amended Complaint ("FAC"), ¶ 13.)

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3 Under the Ordinance, a "wall sign" is defined as "[a]ny sign attached to, painted on or erected against the wall of a building or structure, with the exposed face of the sign in a plane approximately parallel to the plane of the wall." LAMC § 91.6203. A "mural sign" is defined as a sign "which is applied to and made integral with a wall, the written message of which does not exceed three percent of the total area of the sign, and which has been approved pursuant to Section 92.6216 of this code." *Id.* (July 2000 Ed. of the Sign Ordinance, Motion for Preliminary Injunction, Ex. 1, pp. 835-836.)

4 "Mural signs shall not be required to comply with the provisions of Sections 91.6209 (regulating wall signs) and 91. 6220 (regulating off-site signs)." LAMC § 91.6216(b). (Prelim. Inj., Ex. 1, p. 850.)

5 Section 92.6216(a) of the Ordinance provides: "Approval for mural signs shall be obtained from the Cultural Affairs Commission. The placement, height, and overall area of a mural sign shall be approved by the Cultural Affairs Commission. In making its determination the Cultural Affairs Commission shall find that the proposed sign does not conflict with the purposes and objectives set forth in Section 92.6201(b) of this division."

Section 91.6201(b) provides: "The purpose of this division is to promote public safety and welfare by regulating signs in keeping with the following objectives: 1. That the design, construction, installation, repair and maintenance of signs will not interfere with traffic safety or otherwise endanger public safety; 2. That the regulations will provide

Plaintiffs allege that they have leased several sites within the City for placement of signs and, based on the Sign Ordinance, cannot post their signs without the Commission's approval.

On January 5, 2001, Plaintiffs filed their First Amended Complaint for declaratory and injunctive relief and for monetary damages for violations of their civil rights. Plaintiffs contend the Sign Ordinance is unconstitutional on its face and as applied because it abridges rights secured by the First and Fourteenth Amendments. Specifically, the Sign Ordinance: (a) impermissibly discriminates in favor of commercial speech, which is permitted on premises, over non-commercial speech, which is generally prohibited or severely restricted; (b) impermissibly distinguishes between sign messages based on their content; (c) constitutes an unlawful prior restraint of speech; (d) denies Plaintiffs equal protection under the laws in that it deprives Plaintiffs of the same free speech rights that identical land owners are allowed for on-premises signs; and (e) vests virtually unfettered discretion in City officials to deny applications for such signs.

Plaintiffs also claim that unless restrained by the Court, the City will continue to enforce and threaten to enforce the Sign Ordinance against Plaintiffs, compelling the removal of existing signs and prohibiting the

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reasonable protection to the visual environment while providing adequate conditions for meeting sign users' needs; 3. That incompatibility between signs and their surroundings will be reduced; 4. That both the public and sign users will benefit from signs having improved legibility, readability and visibility; 5. That consideration will be given to equalizing the opportunity for messages to be displayed; 6. That adequacy of message opportunity will be available to sign users without dominating the visual appearance of the area."

placement of additional signs on leaseholds already obtained by Plaintiffs.

On February 8, 2001, Plaintiffs moved this Court for a preliminary injunction restraining Defendant City of Los Angeles from "hindering or interfering in any way with the operation and maintenance of wall/mural signs . . . which locations Plaintiffs have leased within the City of Los Angeles." (Motion for Prelim, Inj., ii: 10-12.)

On February 20, 2001, the City filed a Motion to Stay and/or Dismiss Plaintiffs' First Amended Complaint.

After considering the parties' written and oral arguments, the Court issues the following decision:

II. Defendant's Motion to Stay Plaintiffs' FAC

Defendant argues that the Court should abstain from hearing Plaintiffs' claims pursuant to the *Pullman*,6 *Younger*,7 and/or *Colorado River*8 abstention doctrines. Defendant claims that a pending state court criminal case charging Plaintiff Regency Outdoor Advertising Agency with violating the Sign Ordinance at its 1603 So. San Pedro Street location warrants abstention because the 1603 So. San Pedro Street site is part of the instant case.9

After reviewing Defendant's arguments, the Court hereby denies Defendant's Motion to Stay Plaintiffs' FAC.

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6 *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

7 *Younger v. Harris*, 407U.S. 37 (1971).

8 *Colorado River Conservation Dist. v. U.S.*, 424 U.S. 800 (1976).

9 *People v. Regency Outdoor Advertising Agency, West Hollywood Properties, and Drake Kennedy,* Case No. 9CR01496, was filed December 14, 1999 and is presently pending in the Los Angeles Municipal Court.

In making its determination, the Court is mindful of the fact that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *World Famous Drinking Emporium v. City of Temple*, 820 F.2d 1079, 1082 (9th Cir. 1987). "Absent significant countervailing interests, the federal courts are obligated to exercise their jurisdiction." *Id.*

A. *Younger* Abstention

The United States Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971) held that federal courts may not enjoin pending state court criminal proceedings. Under Younger and its progeny, abstention is appropriate in favor of a state proceeding if: (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Adam v. Hawaii*, 235 F.3d 1160, 1163 (9th Cir. 2000).

Plaintiffs list seven sites in their FAC where the City has issued citations for alleged violations of the Sign Ordinance. The 1603 So. San Pedro Street location, which is the subject of the criminal proceeding, is not included in Plaintiffs' FAC. Nothing in Plaintiffs' FAC, therefore, is related to the pending state court proceeding. Moreover, the state court proceeding consists of a single municipal court misdemeanor complaint concerning a single sign. Regency's defense in that action is based primarily on its contention that a valid permit was issued for the site in question over twenty years ago. If the state court makes the factual determination that a valid permit was issued, it may not address Plaintiffs' constitutional concerns. The Court concludes that the state proceedings do not provide an adequate opportunity for Plaintiffs to raise their First Amendment concerns, and *Younger* abstention does not apply.

B. *Pullman* Abstention

"*Pullman* abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). *Pullman* abstention is appropriate if: (1) the complaint touches a sensitive area of social policy into which the federal courts should not enter unless there is no alternative adjudication; (2) a definitive ruling on the state issues by a state court could obviate the need for constitutional adjudication by the federal court; and (3) the proper resolution of the potentially determinative state law issue is uncertain. *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F. 3d 401, 409 (9th Cir. 1996).

As discussed above, Plaintiffs' Complaint does not concern the 1603 So. San Pedro site. Additionally, because First Amendment issues are at the very heart of the present controversy, *Pullman* abstention would be inappropriate. *See, e.g. Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1354 (C.D. Cal. 1995) (*Pullman* abstention inappropriate where owner of adult cabaret brought suit challenging city's denial of a conditional use permit because First Amendment issues were at the core of the controversy).

C. *Colorado River* Abstention

Under the *Colorado River* doctrine, federal courts may decline to exercise their jurisdiction out of deference to pending state court proceedings, but only under truly exceptional circumstances. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 818-819 (1976); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Otherwise, federal courts have a "virtually unflagging obligation ... to exercise the

jurisdiction given them." *See Colorado River*, 424 U.S. at 817. In determining whether it should stay a federal proceeding, the Court looks to the following factors: 1) whether each state or federal court has exercised jurisdiction over the res; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which forums obtained jurisdiction; 5) whether federal or state law controls decisions on the merits; and 6) whether state courts can adequately protect the rights of the parties. *See 40235 Washington St. Corp. v. Lusardi*, 976 F.2d 587, 588 (9th Cir. 1992); *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989). The Court, however, must not use these factors "in a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone*, 460 U.S. at 21.

Defendant's argument that the Court should abstain under *Colorado River* consists of a single conclusory sentence. It has not presented any "exceptional circumstances" justifying abstention. Furthermore, as already discussed, the Court does not believe that there is sufficient similarity between the state and federal proceedings or that the state court can adequately protect Plaintiffs' rights. *Colorado River* abstention is likewise inappropriate.

III. Plaintiff's Motion for Preliminary Injunction

A. Standard

To obtain a preliminary injunction, Plaintiffs must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in their favor. *Gentala v. City of Tucson*, 213 F.3d 1055, 1060 (9th Cir. 2000).

B. Standing

In their Motion for Preliminary Injunction, Plaintiffs challenge the Sign Ordinance provisions concerning mural signs and the Cultural Affairs Commission.10 Defendant argues that Plaintiffs lack standing to bring such a challenge because Plaintiffs' signs are not "murals" as defined in the Sign Ordinance. Plaintiffs' signs exceed the three percent (3%) text limitation applied to murals, and they have not been "applied to and made integral with a wall." Rather, Plaintiffs' signs are "oversized cloth/vinyl banners," attached to the buildings by cables or cords. Because the CAC only regulates murals, Defendant argues that no case or controversy exists, and Plaintiffs' request for a preliminary injunction must be denied.

Plaintiffs, on the other hand, argue that Defendant's contention is unsupported by the record. Plaintiffs point to the Orders to Comply ("OTC") issued to signs located at 6122-6 Hollywood Boulevard, 5300 West Santa Monica Boulevard, and 1603-27 San Pedro Street as proof that their signs have been subjected to the CAC's jurisdiction. Upon careful review, however, the Court finds Plaintiffs' contention meritless.

1. Standing Requirements

To have standing, Plaintiffs must satisfy three elements: (1) they must have suffered an injury in fact; (2)

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10 Although Plaintiffs' FAC challenges the Ordinance's alleged unconstitutional distinction between on-site and off-site signs as well, this challenge does not appear in Plaintiffs' Motion for Preliminary Injunction. In their Reply Brief, Plaintiffs state, "Plaintiffs have never contended that the City may not impose different restrictions on on-site and off-site signs." (Reply, 2:3-4.) Rather, the preliminary injunction addresses the constitutionality of the Cultural Affairs Commission and the definition of "mural signs."

the injury must be fairly traceable to the City's challenged conduct and not the result of the independent action of some third party; and (3) it must be likely that the injury will be redressed by a favorable decision. *Medina v. Clinton,* 86 F.3d 155, 157 (9th Cir. 1996). Plaintiffs have the burden of establishing the elements of standing. *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992). To meet this burden, Plaintiffs must clearly and specifically set forth facts sufficiently to satisfy the standing requirements. *Whitmore v. Arkansas*, 495 U.S. 149, 155-156 (1990).

2. 6122-6 Hollywood Boulevard

On June 17, 1999, an OTC was issued to Plaintiffs for their 6122-6 Hollywood Boulevard location. The OTC refers to a "40' x 100' mural sign requiring Cultural Affairs approval." (Motion for Prelim. Inj., Ex. Q.) Plaintiffs rely on this citation for support that they do in fact maintain mural signs. This citation, however, was dated June 17, 1999. Plaintiffs' FAC demonstrates that Plaintiffs' lease for this site did not begin until January 10, 2000, six months after the citation was issued. (FAC, ¶ 22.) Therefore, the citation concerning the "mural sign" was not issued to Plaintiffs and is irrelevant. Moreover, an OTC was issued to Plaintiffs for the same site on November 18, 2000, after Plaintiffs' lease for this location began. That citation refers to Plaintiffs' failure to obtain permits for two signs: a "40' wide x 80' high temporary banner ... and a 30' wide x 100' high temporary banner." (emphasis added) It makes no reference to murals or to the CAC. (Prelim. Inj., Ex. Q.)

3. 5300 West Santa Monica Boulevard

On March 17, 1999, an OTC was issued to Plaintiffs for their 5300 W. Santa Monica Boulevard site. The

citation refers to the sign as both an "off-site banner sign" and a "mural sign" requiring approval from the Cultural Affairs Commission. (Reply, Ex. I.) Criminal charges were subsequently brought against the owner of this sign after City inspectors revealed he had failed to comply with the OTC.11 The sign was found to be an "off-site banner" attached to the building by cables, and the owner was indicted for failure to comply with a valid OTC, failure to obtain required building permits, and failure to submit plans and obtain approvals. (Sur-Reply, Ex. 1.) These violations were cited in the March 17, 1999 OTC as well. The Court therefore concludes that the 5300 W. Santa Monica Boulevard sign was not a mural sign.

4. 1603-27 San Pedro Street

Finally, Plaintiffs contend that the 1603-27 San Pedro site was cited on February 8, 1999 for having "painted signs" and therefore falls within the CAC's review. (Reply, Preliminary Injunction, Ex. J.) However, in a state civil suit concerning this site,12 the Los Angeles Superior Court denied Plaintiffs' writ of mandate, stating, "Plaintiffs have produced no evidence to show that a permit has ever been issued by the City for the signs painted on the building ... the present ordinance requires a building permit for every sign...."13 (Motion to

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11 *The People of the State of California v. Iraj Nehoray,* Case No. 9CR01229, filed in Los Angeles Municipal Court, attached to Defendant's Sur-Reply, Ex. 1.

12 *West Hollywood Properties, LLC v. City of Los Angeles,* Case No. BC 216698, filed in Los Angeles Superior Court, attached to Defendant's Motion to Stay/Dismiss Plaintiff's FAC, Ex. 11.

13 Section 91.6205 of the Sign Ordinance provides, in pertinent part: "A building permit shall be obtained from the department ... for any signs and/or sign alterations.... Plans and specifications shall be submitted with the application for permit for each sign." Even signs

Stay/Dismiss, Ex. 11, p. 20.) Plaintiffs fail to present any credible evidence that the "painted signs" at this location are mural signs.

4. Plaintiffs' Remaining Sites

In addition to the three sites discussed above, the Court has reviewed all of the "Orders to Comply" issued to Plaintiffs for the signs at issue in their preliminary injunction motion. None of these citations concern "murals" or the CAC. Moreover, Plaintiffs have not rebutted Defendant's contention that all of Plaintiffs' signs exceed the 3% text limit placed on mural signs. Plaintiffs have not submitted photographs or any evidence controverting Defendant's contention that Plaintiffs' signs are not murals. With the exception of the 1603-27 San Pedro Street location, the photographs Plaintiffs filed in support of their motion concern the signs of third parties. Plaintiffs have therefore failed to clearly and specifically set forth facts sufficient to satisfy the standing requirements.

5. Plaintiffs' Remaining Argument

Plaintiffs also argue that they do not have to submit to the CAC's jurisdiction to mount a facial challenge to the constitutionality of the Sign Ordinance. Plaintiffs cite three cases in support of this proposition: *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992); and *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). These cases,

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classified as "mural signs," provides, "In addition to the requirements of this Section, mural signs shall comply with Sections 91.6201 *through 91.6205*." (Emphasis added) (Prelim. Inj., Ex. 1, pp. 837-838, 850.)

however, are materially distinguishable from the case at bar.

a. Shuttlesworth v. City of Birmingham

In *Shuttlesworth*, petitioner was convicted of violating a city ordinance that made it an offense to participate in any parade, procession, or other public demonstration without first obtaining a permit from the city commission. The ordinance provided that "[t]he commission shall grant a written permit for such parade, procession, or other public demonstration, prescribing the streets or other public ways which may be used therefore, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." 394 U.S. at 149-150. Without appiying for a permit, petitioner and over fifty others marched through the city streets, protesting the alleged denial of their civil rights. At the end of four blocks, the marchers were stopped by city police and arrested for violating the ordinance.

The Supreme Court in *Shuttlesworth* found the ordinance to be unconstitutional, for it "conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways." *Id.* at 150. The Court noted that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of free expression for which the law purports to require a license." *Id.* at 151. The Court went on to say, "The Constitutional can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Id.* (*citing Jones v. City of Opelika*, 316 U.S. 584, 602 (1942).)

Shuttlesworth does not help the Plaintiffs. The petitioner in *Shuttlesworth* clearly had standing to sue because the ordinance was enforced against him. Here, Plaintiffs have not been "subjected to the restraints" of the portion of the Sign Ordinance in question, for none of Plaintiffs' signs are murals subject to CAC review.

b. Forsyth County, Georgia v. Nationalist Movement

In *Forsyth*, an organization filed suit challenging the constitutionality of the county's assembly and parade ordinance. The county's ordinance mandated permits for private demonstrations and other uses of public property; declared that the cost of protecting participants in such activities should be borne by the participants; and required every permit applicant to pay a fee of not more than $1000. The county administrator was empowered to adjust the fee amount "to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." 505 U.S. at 127.

An organization sought to demonstrate in opposition to the Martin Luther King, Jr. holiday. The county imposed a $100 fee. The fee did not include any adjustment for potential law enforcement costs but was based on the county administrator's time in issuing the permit. The organization did not pay the fee and did not hold the rally. Instead, it filed suit challenging the constitutionality of the ordinance.

In concluding the organization had standing to sue, the Court stated:

> "[I]n the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable. (citations) This exception

> from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court. (citations) Thus, the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker...." (citations)

Id. at 129.

Forsyth does not support Plaintiffs' request for preliminary injunction, because, as previously observed, there is no evidence that any of Plaintiffs' existing signs are subject to the alleged unconstitutional portion of the Sign Ordinance, or that Plaintiffs have been prevented from erecting signs on any of their leased premises because of the existence of the ordinance. The foregoing quotation from Forsyth, in the abstract, would appear to support Plaintiffs' position. However, the clear holding of other decisions of the U.S. Supreme Court14 makes it clear that the exception to the standing rule in *Forsyth* applies to cases in which a plaintiff, although subject to the challenged law, has not been unconstitutionally affected by it. In the instant case, Plaintiffs have not

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14 *See, e.g., Laird v. Tatum*, 408 U.S. 1, 12-13 (1972) (although governmental action need not have direct effect on exercise of First Amendment rights, it must have caused or must threaten to cause direct injury to plaintiffs); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755 (1988) (although one may challenge a licensing statute as facially invalid, without first applying for a license, to have standing, a plaintiff must demonstrate that he or she is subject to the licensing law).

demonstrated that they are subject to the ordinance complained of.

Moreover, a "litigant may not ... assert the unconstitutionality of a state criminal statute 'merely because he desires to wipe it off the books or even because he may some day wish to act in a fashion that violates it.'" *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193, 198 (5th Cir. 1984) (*citing KVUE v. Austin Broadcasting Corp.*, 709 F.2d 922, 928 (5th Cir. 1983). Rather, a party must demonstrate a realistic danger that he or she will sustain a direct injury as a result of the statute's operation or enforcement. *See Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (standing requires parties to have "actual and well-founded fear that the law will be enforced against them"); *Blair v. Shanahan*, 38 F.3d 1514, 1519 (9th Cir. 1994) (courts inquire whether "plaintiffs showed a reasonable threat of prosecution under the statute"). Plaintiffs present no evidence that their signs are murals or that the CAC approval requirement will be enforced against them in the immediate future.

c. Desert Outdoor Adver., Inc. v. City of Moreno Valley

Finally, in *Desert Outdoor*, billboard operators brought suit challenging a city ordinance regulating signs and structures. The ordinance regulated both on-site and off-site signs and imposed different restrictions on them. Before anyone could erect an off-site signs, the ordinance required that the person apply for a conditional use permit. City officials would grant a permit upon finding that such a display would not have a harmful effect upon the health or welfare of the general public or upon the aesthetic quality of the community. 103 F3d. at 817. Two billboard

companies constructed off-site signs without obtaining the required permits. The city brought two separate state court actions against them. The billboard companies brought suit in federal court to challenge the constitutionality of the ordinance. The city argued that the billboard companies lacked standing to challenge the ordinance.

The Ninth Circuit found the billboard companies did have standing because the city actually brought an enforcement action against them; the billboard companies' injury was directly traceable to the city's conduct in passing the ordinance; and declaring the ordinance to be unconstitutional would likely redress the companies' injuries by enabling them to maintain their signs. *Id.* at 818.

In the case at bar, Defendant has brought enforcement actions against Plaintiffs, but not for failure to seek CAC approval for their signs. Additionally, even if the Court were to declare the CAC approval requirement unconstitutional, Plaintiffs' alleged injuries would not be redressed, for none of Plaintiffs' signs are murals subject to CAC review.

The Court therefore concludes, on the record before it, that Plaintiffs lack standing to challenge the constitutionality of the CAC. Plaintiffs have failed to meet their burden of setting forth clear and specific facts sufficient to satisfy the standing requirements. There is no evidence that Plaintiffs' signs are "murals" or that the CAC has rejected any of Plaintiffs' signs. Plaintiffs' Motion for a Preliminary Injunction is denied.

IV. Defendant's Motion to Dismiss Plaintiffs' FAC

A. Standard

Defendant's motion requires the Court to determine whether Plaintiffs' First Amended Complaint states claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). The Court will not dismiss Plaintiffs' claims for relief unless they cannot prove any set of facts in support of their claims that would entitle them to relief. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). In limiting its inquiry to the content of the Complaint, the Court must take the allegations of material fact as true and construe them in the light most favorable to the Plaintiffs. *See Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Additionally, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994).

B. Preliminary Issues

1. Statute of Limitations

Defendant argues that Plaintiffs' First Amended Complaint is barred by two separate statutes of limitations. First, Defendant argues Plaintiffs' claims are barred by the 90-day statute of limitations set forth in CAL. GOV'T CODE § 65009 (c)(2), which provides that legal actions filed to "attack, review, set aside, void or annul the decision of a legislative body to adopt or amend a zoning ordinance" must be "brought within 90 days after the legislative body's decision." Alternatively, Plaintiffs' suit is barred by the one-year statute of limitations applicable to 42 U.S.C. § 1983 actions. Because the Sign Ordinance was

originally enacted in 1986 and last amended in July, 1996, and Plaintiffs' FAC was not filed until October 11, 2000, Defendant argues Plaintiffs' claims are untimely.

Neither of these two statutes of limitations applies to Plaintiffs' claims. "It is doubtful that an ordinance facially offensive to the First Amendment can be insulted from challenge by a statutory limitations period." *Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991). "Because strong policy reasons militate in favor of permitting facial challenges to statutes that impinge upon protected First Amended rights, the statute of limitations should not preclude a plaintiff from bringing a facial challenge more than one year after the statute's enactment. *Sante Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1364-1365 (C.D. Cal. 1995). "[A] statute that, on its face, violates the First Amendment's guarantee of free speech inflicts a continuing harm." *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1278 (C.D. Cal. 1996). Plaintiffs' challenge to the City's Sign Ordinance is therefore not barred by the statute of limitations.

2. Exhaustion of Administrative Remedies

Defendant argues that Plaintiffs' FAC should be dismissed because Plaintiffs have failed to exhaust their administrative remedies pursuant to LAMC § 98.0403.1. Plaintiffs are not required, however, to exhaust administrative remedies since they are challenging the Sign Ordinance as facially invalid. *See Nat'l Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2nd Cir. 1990); *see also Shuttlesworth*, 394 U.S. at 151 ("'The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.'") (citations omitted). Additionally, because

Plaintiffs have brought suit pursuant to 42 U.S.C. § 1983, they are not required to exhaust their administrative remedies in state court. *Bd. Of Regents v. Tomanio*, 446 U.S. 478, 491 (1980); *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

3. Standing

As previously discussed, Defendant argues Plaintiffs lack standing to challenge the constitutionality of the Sign Ordinance because Plaintiffs' signs are not murals. However, as distinguished from a request for a preliminary injunction, the Court does not reach the merits of a Complaint on a motion to dismiss. Rather, the Court looks only to the contents of the Complaint in the light most favorable to Plaintiffs. *See Potthoff v. Morin*, 245 F.3d 710, 715 (8th Cir. 2001) ("'For purposes of ruling on a motion to dismiss for want of standing ... courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'") (*citing Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

Plaintiffs have alleged facts sufficient to demonstrate that they have a "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 209 (1962). Plaintiffs allege that they have leased several sites within the City's jurisdiction for the placement of large "wall/mural-type painted signs." (FAC, ¶ 17.) Plaintiffs allege that based on the Sign Ordinance, they cannot post their "advertising copy at these sites absent the approval by the Cultural Affairs Commission." (*Id.*) Plaintiffs conclude that "the restrictions now in place by the City have deprived Plaintiff[s] of [their] advertising clientele of their free speech rights." (*Id.* at ¶ 18.) In addition,

Plaintiffs allege that they are in the business of leasing outdoor advertising space for off-premises signs, and the Sign Ordinance impermissibly distinguishes between off-premises and on-premises signs. (FAC, ¶¶ 10, 12.) The Court therefore concludes that Plaintiffs' allegations are sufficient to confer standing to defeat a Motion to Dismiss.

C. Failure to State a Claim

Finally, Defendant argues that Plaintiffs have failed to allege facts sufficient to support their claims for: (1) declaratory relief for violation of Plaintiffs' First Amendment Rights; (2) injunctive relief preventing the City from enforcing the Sign Ordinance; and (3) damages pursuant to 42 U.S.C. § 1983 for the City's violation of Plaintiffs' civil rights.

1. Declaratory Relief

In order to state a claim for declaratory relief, Plaintiffs must allege a "justiciable controversy." *Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493, 510 (5th Cir. 1999). The Complaint must disclose "a legal right, relation, status, or interest claimed by [P]laintiff[s] over which a dispute with the [D]efendant has arisen." 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1238 at 287 (2d ed. 1990) (citing *Paper Carriers Union No. 450 v. Pulitzer Pub. Co.*, 309 F.2d 716 (8th Cir. 1962)).

Here, Plaintiffs allege that "an actual and justiciable controversy has arisen and now exists between Plaintiffs and Defendant concerning the constitutionality of the Sign Ordinance." (FAC, ¶ 39.) Plaintiffs contend that the Sign Ordinance "impermissibly discriminates in favor of commercial speech ... over non-commercial speech;" "... constitutes an unlawful prior restraint of speech...;" and "denies Plaintiffs equal protection of the laws ...." (*Id.* at

¶ 40.) Plaintiffs have therefore alleged a "justiciable controversy" sufficient to state a claim for declaratory relief.

2. Injunctive Relief

In their second cause of action, Plaintiffs' seek injunctive relief to restrain the City from enforcing the Sign Ordinance against their signs. To state a claim for injunctive relief, Plaintiffs must demonstrate "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996). Plaintiffs allege that unless an injunction is issued, "Plaintiffs will be irreparably injured in that they will be deprived of their constitutional rights guaranteed under the Federal and State Constitutions, will suffer substantial loss of rents, profits and goodwill ... and will be subjected to a multiplicity of suits." (FAC, ¶ 47.) The enforcement of the Sign Ordinance will also "have a chilling effect on the exercise of First Amendment rights by members of the public." (*Id.*) As such, Plaintiffs allege they have "no adequate remedy at law to prevent or redress this irreparable injury." (FAC, ¶ 48.) Plaintiffs have therefore sufficiently stated a claim for injunctive relief.

3. Deprivation of Civil Rights, 42 U.S.C. § 1983

To state a claim under § 1983, Plaintiffs must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1998). Plaintiffs allege that Defendant has deprived them of "rights, privileges and immunities secured by the Constitution of the United States, specifically, the right to

freedom of speech, due process and equal protection of the laws as secured by the First, Fifth and Fourteenth Amendments...." (FAC, ¶ 51.) Plaintiffs have allegedly been deprived of "rents, profits and goodwill from the maintenance and lease of the off-premises signs...." (*Id.* at ¶ 53.) Plaintiffs claim that in performing said acts, Defendant has "acted under color of statute, ordinance, regulation and policy of the municipality...." (FAC, ¶ 52.) Plaintiffs have satisfied the pleading requirements for bringing a claim under 42 U.S.C. § 1983.

V. Conclusion

The Court hereby denies Plaintiffs' Motion for Preliminary Injunction. Defendant's Motion to Stay and/or Dismiss Plaintiffs' First Amended Complaint is denied.

/s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT

IT IS SO ORDERED.

May 30, 2001

APPENDIX D

LOS ANGELES MUNICIPAL CODE
DIVISION 62 (BUILDING CODE)
SIGNS

SEC. 91.6201. SCOPE AND PURPOSE.

(a) Scope. All exterior signs and sign support structures shall conform to the requirements of this division and all other applicable provisions of this code.

(b) Purpose. The purpose of this division is to promote public safety and welfare by regulating signs in keeping with the following objectives:

1. That the design, construction, installation, repair and maintenance of signs will not interfere with traffic safety or otherwise endanger public safety;

2. That the regulations will provide reasonable protection to the visual environment while providing adequate conditions for meeting sign users' needs;

3. That incompatibility between signs and their surroundings will be reduced;

4. That both the public and sign users will benefit from signs having improved legibility, readability and visibility;

5. That consideration will be given to equalizing the opportunity for messages to be displayed;

6. That adequacy of message opportunity will be available to sign users without dominating the visual appearance of the area.

SEC. 91.6202. ENFORCEMENT.

(a) Violations. It shall be unlawful for any person to erect, construct, install, enlarge, alter, repair, move, remove, convert, demolish, use or maintain any sign or sign support structure or cause or permit the same to be done, in violation of any of the provisions of this division.

Any person who violates any causes or permits another person to violate any of the provisions of this division is guilty of a misdemeanor.

SEC. 91.6203. DEFINITIONS
The following terms whenever used in this division are defined below. To the extent that other terms used in this division are defined in Section 12.03 and Division 2 of Article 1 of Chapter IX of this Code, those definitions shall apply.

BUILDING FRONTAGE. The projection of the building walls upon the street used for street frontage.

FACE OF BUILDING. The general outer surface, not including cornices, bay windows or architectural projections, of any exterior wall of a building.

* * *

INFORMATION SIGN. A sign which is limited to a message giving directions, instructions, menus, selections or address numerals.

* * *

MURAL SIGN. A sign which is applied to and made integral with a wall, the written message of which does not exceed three percent of the total area of the sign, and which has been approved pursuant to Section 91.6217 of this Code.

ON-SITE SIGN. A sign that is other than an off-site sign.

OFF-SITE SIGN. A sign which displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial or noncommercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where such sign is located.

* * *

SIGN. Any display board, wall, screen, object or part thereof, used to announce, declare, demonstrate, display or otherwise present a message and attract the attention of the public.

SIGN AREA. An area circumscribed by the smallest geometric shape created with a maximum of eight straight lines which will enclose all words, letters, figures, symbols, designs and pictures, together with all framing, background material, colored or illuminated areas and attention-attracting devices forming an integral part of an individual message except that:

1. Wall signs having no discernible boundary shall have the areas between the letters, words intended to be read together and any device intended to draw attention to the sign message included in any computation of surface area.

2. For spherical, cylindrical or other three-dimensional signs the area of the sign shall be computed from the smallest two-dimensional geometrical shape or shapes which will best approximate the greatest actual surface area visible from any one direction.

* * *

WALL SIGN. Any sign attached to, painted on or erected against the wall of a building or structure, with the exposed face of the sign in a plane approximately parallel to the plane of the wall.

SEC. 91.6205. GENERAL REQUIREMENTS.

(a) Permit Required. A building permit shall be obtained from the department in accordance with the provisions of Division 2 of Article 1 of Chapter IX of this code for any signs and/or sign alterations, other than changes or replacement of any copy, that are regulated by this division, except those signs specified in Section 91.0102(b) 26 and 27 of this code and temporary signs containing political, ideological or other noncommercial messages. Where signs are illuminated by electric lighting, an electrical permit shall also be obtained as required by Article 3 of Chapter IX of this code.

SEC. 91.6216. MURAL SIGNS.

(a) Approval. Approval for mural signs shall be obtained from the Cultural Affairs Commission. The placement, height, and overall area of a mural sign shall be as approved by the Cultural Affairs Commission. In making its determination the Cultural Affairs Commission shall find that the proposed sign does not conflict with the purposes and objectives set forth in Section 91.6201(b) of this division.

(b) General Requirements. In addition to the requirements of this Section, mural signs must comply with Sections 91.6201 through 91.6205. Mural signs shall not be required to comply with the provisions of Sections 91.6209 and 91.6220 of this Section.

SEC. 91.6220. OFF-SITE SIGNS.

(a) General. Off-site signs shall comply with the requirements of this Section and any applicable provisions of Sections 91.6201 through 91.6205 of this division.

(b) Location.

1. No portion of an off-site sign with a sign area greater than 80 square feet shall be placed within 200 feet of a residentially zoned lot which is located on the same side of the same street as the lot on which the sign is placed. However, where a lot has two or more street frontages, an off-site sign may be located on that street frontage which is not on the same street as the residentially zoned lot; provided, the off-site sign and sign support structure is placed in that half of the lot that is the farthest from the street frontage on which the residentially zoned lot is located.

2. No portion of an off-street sign or sign support structure shall be located in that half of a lot located farthest from the street frontage, when residentially zoned property is located to the rear of that street frontage.

3. Off-site signs are not permitted along that portion of lots having a street frontage of less than 50 feet.

4. No more than four off-site signs shall be located at the intersection of two or more streets when such signs are located within 150 feet of the intersection of two street frontages.

5. An off-site sign face shall not located within 1 feet of an interior lot line.